

REALTORS® Guide to Arbitration and Mediation

NATIONAL ASSOCIATION OF REALTORS®

2002 Edition

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Introduction

Ever since like-minded real estate professionals gathered nearly a century ago to found the organization known today as the NATIONAL ASSOCIATION OF REALTORS[®], the cooperative real estate transaction has been a hallmark of REALTORS[®]. The importance of cooperation in advancing the interests of sellers and buyers, landlords and tenants, and others who rely on REALTORS[®] and their services is underscored by the fact that the REALTORS[®] Code of Ethics has required cooperation as a condition of membership since the Code was created in 1913. The cooperative transaction has no parallel in other fields of professional endeavor. REALTORS[®] compete with each other, vigorously but fairly, to secure the right to represent clients. Once the initial competition to secure a listing or representation agreement is decided, the environment changes from one of competition to one of cooperation to achieve the desired objective - the successful real estate transaction. In many instances, particularly those involving residential real estate, compensation is offered by listing brokers to secure the cooperative services of other brokers. In the increasingly complex and dynamic environment in which REALTORS[®] function, it is inevitable that good faith disagreements will arise. To ensure that such disputes are resolved expeditiously, efficiently and economically, the Code has always maintained the corollary duty to arbitrate disputes with other REALTORS[®]. This duty - and privilege - of membership is sometimes misunderstood, and in some cases is wrongly viewed as an unwanted or unwarranted burden.

This *Guide* was developed at the direction of the National Association's Professional Standards Committee to provide REALTORS[®] and association executives with an understanding of the rationale for the obligation, an overview of the process, and guidance in conducting business so as to avoid disputes. It is with this in mind that this *Guide* is dedicated to the women and men who serve on Grievance and Professional Standards Committees at the local, state and national levels.

Arbitration -- A Duty and a Privilege

Although the duty to arbitrate is addressed in the new member orientation of many boards and associations, often the reality of that obligation does not become truly apparent until the first time a REALTOR[®] initiates the process, or the first time a REALTOR[®] is named as respondent in an request. To better understand the duty to arbitrate, it may help to understand who is required to arbitrate, and the circumstances under which it is mandatory, and the circumstances under which it is voluntary.

The duty of REALTORS[®] to arbitrate is based in the Code of Ethics, specifically Article 17 which provides:

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS[®] (principals) associated with different firms, arising out of their relationship as REALTORS[®], the REALTORS[®] shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.

In the event clients of REALTORS[®] wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS[®] shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision.

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS[®] (principals) to cause their firms to arbitrate and be bound by any award. (Amended 1/01)

While many disputes that arise between REALTORS[®] will involve contractual questions, under certain circumstances there also may be related "non-contractual" issues or questions that arise. For that reason, the duty to arbitrate encompasses not only contractual issues, but also a number of specific non-contractual issues enumerated in Standard of Practice 17-4 which provides:

w Standard of Practice 17-4

Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are:

- 1. Where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. In such cases the complainant may name the first cooperating broker as respondent and may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)*
- 2. Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by*

the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)

3. *Where a buyer or tenant representative is compensated by the buyer or tenant and, as a result, the listing broker reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)*
4. *Where two or more listing brokers claim entitlement to compensation pursuant to open listings with a seller or landlord who agrees to participate in (or who requests arbitration) and who agrees to be bound by the decision. In cases where one of the listing brokers has been compensated by the seller or landlord, the other listing broker, as complainant, may name the first listing broker as respondent and arbitration may proceed between the brokers. (Adopted 1/97)*

It should be understood that "non-contractual" issues that can be arbitrated by hearing panels of board/association professional standards committees are limited to those referenced in Standard of Practice 17-4.

While the duty to arbitrate is shared by all REALTORS[®], as a practical matter most arbitration hearings take place between REALTORS[®] who are principals in their firms or who "stand in the shoes" of principals (often branch office managers). An important point to remember is that REALTOR[®] membership and the duty to abide by the Code of Ethics is personal to each REALTOR[®]. The same is true for the duty to arbitrate which is personal though it includes the duty to "cause" REALTORS[®]' firms to arbitrate. The National Association of REALTORS[®] *Code of Ethics and Arbitration Manual* includes all of the policies established by the NAR Board of Directors that relate to arbitration. These policies require that real estate-related disputes between REALTORS[®] (principals) in different firms, and disputes between REALTORS[®] (principals) and their clients must be arbitrated if arbitration is requested by any appropriate party and it is subsequently determined that an arbitrable dispute exists.

Arbitration is voluntary in instances where a dispute involves a REALTORS[®] (principal) and a REALTORS[®] (nonprincipal) who are or were members of the same firm at the time the dispute arose; between REALTORS[®] (principals) and nonmember brokers; and between REALTORS[®] (principals) and their customers. Definitions of key terms, including "principal," "client," and "customer" are found in the *Manual*. It is important to note that in those circumstances defined as

"voluntary" in the *Manual*, arbitration can take place only if each party to the dispute voluntarily agrees to submit to arbitration and to be bound by the decision of the arbitration hearing panel.

A frequently asked question is whether all disagreements or disputes (particularly those between principal brokers in different firms) must be arbitrated? The simple answer is no. Arbitration of disputes, including those that fall under the "mandatory" category is required only when a party with standing invokes the arbitration process and it is determined by the Grievance Committee that an arbitrable dispute exists and that arbitration of the dispute is mandatory. For example, if two REALTORS® who are principal brokers in two different firms have a dispute, either may request arbitration. However if neither REALTOR® requests arbitration, a board/association cannot inject itself into their dispute and compel arbitration. If one of the REALTORS® pursues another remedy, e.g. litigation, and the other REALTOR® does not request arbitration, the REALTOR® who filed litigation is not in violation of the Code of Ethics. If, on the other hand, the second REALTOR® does request arbitration and the matter is found to be subject to mandatory arbitration by the Grievance Committee, the REALTOR® who brought the litigation must then terminate the lawsuit and submit to arbitration. This principle is established in Standard of Practice 17-1 which provides:

w *Standard of Practice 17-1*

The filing of litigation and refusal to withdraw from it by REALTORS® in an arbitrable matter constitutes a refusal to arbitrate. (Adopted 2/86)

Another frequently asked question is why **require** arbitration under any circumstances? Why shouldn't arbitration be entirely voluntary? The answer is simple and straightforward. The foundation for the Code of Ethics is the protection it affords the public - those who take advantage of and rely on the services REALTORS® provide to their clients and customers. The Code is premised on the principle that cooperation advances the best interests of those clients and customers. If cooperation is the norm which is not only expected but demanded of REALTORS®, if REALTORS® are going to work closely and cooperatively with others who are at the same time their competitors, then there must be an efficient, economical, and reliable method to resolve the disagreements that will inevitably arise. Litigation is cumbersome, adversarial, time-consuming, and expensive. In comparison, arbitration is less formal, faster, less expensive and, if conducted in an appropriate atmosphere, less contentious and confrontational. Put plainly, arbitration is the "grease" that makes the "wheels" of cooperation between REALTORS® turn smoothly.

Arbitrable Issues

The following discussion of what constitutes an arbitrable issue is taken from the 2002 Edition of the NAR *Code of Ethics and Arbitration Manual*.

Appendix I to Part Ten

Arbitrable Issues

Article 17 of the Code of Ethics provides:

In the event of contractual disputes or specific non-contractual disputes as defined by Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.

In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision. (Revised 1/97)

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award. (Amended 1/01)

Part Ten, Section 43, *Arbitrable Issues*, in this Manual provides in part:

As used in Article 17 of the Code of Ethics and in Part Ten of this Manual, the terms "dispute" and "arbitrable matter" refer to contractual issues and questions, and certain specific non-contractual issues and questions outlined in Standard of Practice 17-4, including entitlement to commissions and compensation in cooperative transactions, that arise out of the business relationships between REALTORS®, and between REALTORS® and their clients and customers, as specified in Part Ten, Section 44, Duty and Privilege to Arbitrate. (Revised 11/96)

Part Nine, Section 42, *Grievance Committee's Review and Analysis of a Request for Arbitration*, provides, in part, in Subsection (B) (7): "If the facts alleged in the request for arbitration were taken as true on their face, is the matter at issue related to a real estate transaction and is it properly arbitrable -- i.e., is there some basis on which an award could be based?"

Despite the guidance provided in the above-referenced sections of the *Code of Ethics and Arbitration Manual*, questions continue to arise as to what constitutes an arbitrable issue, who are the appropriate parties to arbitration requests, etc. To provide guidance to board grievance committees in their review of arbitration requests, the Professional Standards Committee of the National Association provides the following information. Arbitration by boards of REALTORS® is a process authorized by law in virtually every state. Arbitration is an economical, efficient, and expeditious alternative to civil litigation. Jurists, including the former U. S. Supreme Court Chief Justice Warren Burger, have endorsed arbitration as a method of reducing the litigation backlog in the civil courts.

To conduct arbitration hearings, boards of REALTORS[®], acting through their grievance committees and professional standards committees, must have a clear understanding of what constitutes an arbitrable issue. An arbitrable issue includes a contractual question arising out of a transaction between parties to a contract in addition to certain specified non-contractual issues set forth in Standard of Practice 17-4. Many arbitrations conducted by boards of REALTORS[®] involve entitlement to compensation offered by listing brokers through a multiple listing service or otherwise to cooperating brokers acting as subagents, as agents of purchasers, or in some other recognized agency or non-agency capacity. Frequently, at closing, the listing broker will be paid out of the proceeds of the sale and will direct that a disbursement be made to the cooperating broker who the listing broker believes was the procuring cause of the sale. Subsequently, another broker who may have been previously involved in the transaction will file an arbitration request claiming to have been the procuring cause of sale, and the question arises as to who is the proper respondent.

In our example, assume that the listing broker is Broker A, the cooperating broker who was paid is Broker B, and the cooperating broker who was not paid, but who claims to be the procuring cause of sale, is Broker C. It is not unusual for arbitration requests filed by one cooperating broker to name another cooperating broker as the respondent. This is based on the assumption that the monies the listing broker paid to Broker B are unique and that the listing broker's obligation to compensate any other broker is extinguished by the payment to Broker B, irrespective of whether Broker B was the procuring cause of sale or not. However, the mere fact that the listing broker paid Broker B in error does not diminish or extinguish the listing broker's obligation to compensate Broker C if a hearing panel determines that Broker C was, in fact, the procuring cause of sale.

Does this mean that a listing broker is always potentially obligated to pay multiple commissions if a property was shown by more than one cooperating broker? Not necessarily. When faced with Broker C's arbitration request, the listing broker could have initiated arbitration against Broker B, requesting that the hearing panel consider and resolve all of the competing claims arising from the transaction at the same time. Professional Standards Policy Statement 27, Consolidation of arbitration claims arising out of the same transaction, provides: "Upon review by the Grievance Committee, or upon motion by either the complainant or the respondent, an arbitration request may be amended to include any additional appropriate parties so that all related claims arising out of the same transaction can be resolved at the same time."

A listing broker may realize, prior to the closing of a transaction, that there may be more than one cooperating broker claiming compensation as the procuring cause of sale. In such instances, to avoid potential liability for multiple compensation claims, the listing broker, after the transaction has closed, can initiate an arbitration request naming all of the potential claimants (cooperating brokers) as respondents. In this way, all of the potential competing claims that might arise can be resolved through a single arbitration hearing.

There is also an alternative avenue of arbitration available to REALTORS[®] involved in disputes arising out of cooperative real estate transactions. Standard of Practice 17-4 recognizes that in some situations where a cooperating broker claims entitlement to compensation arising out of a cooperative transaction, a listing broker will already have compensated another cooperating broker or may have reduced the commission payable under a listing contract because a cooperating broker has expressly sought and/or chosen to accept compensation from another

source, e.g. the seller, the purchaser, etc. Under the circumstances specified in Standard of Practice 17-4, the cooperating brokers may arbitrate between themselves without naming the listing broker as a party. If this is done, all claims between the parties, and claims they might otherwise have against the listing broker, are extinguished by the award of the arbitrators.

In reviewing requests for arbitration, it is important that grievance committees not take actions that could be construed as rendering decisions on the merits. For example, a grievance committee should not dismiss an otherwise arbitrable claim simply because grievance committee members believe the respondent would undoubtedly prevail in a hearing. On the other hand, an arbitration request that cites no factual basis on which a hearing panel could conceivably base an award should not be referred for hearing. A party requesting arbitration must clearly articulate, in the request for arbitration, facts that demonstrate a contractual relationship between the complainant and the respondent, or a relationship described in Standard of Practice 17-4, and an issue that could be the basis on which an arbitration award could be founded.

Another question that frequently arises with respect to arbitration requests is whether the fact that the listing broker was paid out of the proceeds of the closing is determinative of whether a dispute will be considered by a hearing panel. Initially, it should be noted that the Arbitration Guidelines (Appendix II to Part Ten) provide that an arbitrable issue involving procuring cause requires that there have been a "successful transaction." A "successful transaction" is defined as "a sale that closes or a lease that is executed." Some argue that if the listing broker is not paid, or if the listing broker waives entitlement to the commission established in the listing contract, then there is nothing to pay to the cooperating broker and thus no issue that can be arbitrated. This is an improper analysis of the issue. While the listing broker needs the consent of the seller/client to appoint subagents and to compensate subagents, buyer agents, or brokers acting in some other recognized agency or non-agency capacity, the offer to compensate such individuals, whether made through the multiple listing service or otherwise, results in a separate contractual relationship accepted through performance by the cooperating broker. Thus, if the cooperating broker performs on the terms and conditions established by the listing broker, the fact that the listing broker finds it difficult to be paid or, alternatively, waives the right to be paid, has no bearing on whether the matter can be arbitrated but may have a direct impact on the outcome. Many cooperative relationships are established through MLS and the definition of the MLS provides, in part:

While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional, a listing broker's obligation to compensate a cooperating broker who was the procuring cause of sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration Hearing Panel based on all relevant facts and circumstances including, but not limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in*

the listing agreement might not be paid.

The foregoing are by no means all-inclusive of the consideration that must be taken into account by a grievance committee in determining whether a matter will be arbitrated. However, they are some of the common questions raised with respect to arbitrable issues, and this discussion is provided to assist grievance committees in their important role in evaluating arbitration requests.

* Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to Multiple Listing Policy Statement 7.23, "Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of a Board of REALTORS®," *Handbook on Multiple Listing Policy*.

The Arbitration Hearing -- An Overview

Participation in a professional standards hearing - arbitration or ethics - can be an intimidating experience for first time participants, witnesses and even new panel members. Knowing what will likely happen can make it a less stressful experience.

Although the arbitration hearing process is based on the judicial model of a civil trial, there are important differences between a trial and an arbitration hearing. While parties to any professional standards proceeding are entitled to fundamental due process, technical rules of evidence and procedure do not apply in an arbitration hearing. While the burden of proof rests with the parties, arbitration panel members can ask questions (directly or through the chair) to ensure that they have a clear understanding of relevant issues and facts. This is key to rendering a fair decision.

Parties are entitled to have legal counsel present but must respond to questions asked by panel members - or asked by other parties or their counsel when directed to respond by the chair.

Prior to the hearing, parties have the opportunity to challenge potential panel members for cause. While there are no preemptory or "automatic" challenges, boards/associations make all reasonable efforts to ensure that panel members will be impartial, unbiased, and fair.

At the beginning of an arbitration hearing the chair introduces herself and the other panel members and explains the procedures that will be followed. The chair also introduces the parties and their counsel, and others who may be present to assist the panel, which might be board legal counsel, a court reporter, or board/association staff.

Following the chair's introductory comments, the parties and their witnesses are sworn or affirmed. Witnesses are then excused from the hearing room until it is time for them to testify.

The complainant(s) testifies first. Complainants can introduce evidence and call witnesses to support their case. The respondent or the respondent's attorney can cross-examine the complainant and witnesses who testify for the complainant. After the complainant(s) finishes his presentation, respondents have the opportunity to present their evidence and testimony.

After the parties have had their chance to conduct cross-examination, panel members can ask questions of anyone who testifies. This differs from a trial in that while each party is primarily responsible for making their case, hearing panelists will want to clearly understand the events leading up to the dispute so that they can make an informed and fair decision. The fact that panel members can ask questions, is no substitute for thorough advance preparation by the parties.

Following the parties' presentations and any subsequent questions from panel members, each party or their counsel is entitled to make a closing statement, succinctly summarizing the salient points of their case.

After the closing statements, the chair adjourns the hearing and the hearing panel then (either immediately or at a future time) goes into executive session to determine the award. Awards may be for the amount requested or for a lesser amount. Hearing panels are not authorized to award more than was requested or to award punitive damages. Attorneys' fees and interest may be part

of an award only if such amounts were part of the underlying contractual agreement that is the subject of the dispute.

Parties to arbitration are entitled to due process. For that reason, parties may request procedural review of the arbitration hearing process if they believe they did not get a fair hearing. A review of the hearing process must be distinguished from review of the award itself. Disagreement with the decision of the hearing panel is **not** a basis to institute a procedural review. For an arbitration award to be overturned, it is necessary for a party to demonstrate that he or she was denied a fundamentally fair hearing.

It is the arbitration statutes of the respective states that permit bodies such as boards/associations of REALTORS[®] to conduct arbitration, and it is the courts of each state, and not boards/associations of REALTORS[®] that have legal authority to compel payment of arbitration awards. It is, however, anticipated that REALTORS[®], as professional business people, will meet their obligations, including payment of arbitration awards, promptly. In the event a REALTOR[®] does not pay an arbitration award, the board may assist the prevailing party in seeking judicial enforcement in the courts. Some boards/associations have adopted rules that require payment of awards within a specified period or payment of an equivalent amount to be held in escrow by the board/association pending the outcome of procedural review or legal challenge to the arbitration process. In those boards/associations, if the award is not paid, or an equivalent amount is not deposited with the board/association, the member may be subject to disciplinary action, including suspension or termination of membership, at the discretion of the Board of Directors.

Detailed information about the specific arbitration procedures can be obtained from the local board/association of REALTORS[®].

National Association of REALTORS® Arbitration Guidelines

REALTORS® participating in arbitration hearings will want to familiarize themselves with the factors which will be considered by an arbitration hearing panel in adjudicating a dispute. The following is reprinted from the 2002 edition of the *Code of Ethics and Arbitration Manual*. Although intended primarily to guide hearing panels, REALTORS® preparing for arbitration may also benefit from careful study.

Appendix II to Part Ten Arbitration Guidelines

(Suggested Factors for Consideration by a Hearing Panel in Arbitration)

A key element in the practice of real estate is the contract. Experienced practitioners quickly become conversant with the elements of contract formation. Inquiry, invitation, offer, counteroffer, contingency, waiver, acceptance, rejection, execution, breach, rescission, reformation, and other words of art become integral parts of the broker's vocabulary. Given the significant degree to which Article 3's mandate for cooperation - coupled with everyday practicality, feasibility, and expediency - make cooperative transactions facts of life, it quickly becomes apparent that in virtually every real estate transaction there are actually several contracts which come into play. Setting aside ancillary but still important contracts for things such as mortgages, appraisals, inspections, title insurance, etc., in a typical residential transaction (and the same will be true in many commercial transactions as well) there are at least three (and often four) contracts involved, and each, while established independently of the others, soon appears to be inextricably intertwined with the others.

First, there is the listing contract between the seller and the listing broker. This contract creates the relationship between these parties, establishes the duties of each and the terms under which the listing broker will be deemed to have earned a commission, and frequently will authorize the listing broker to cooperate with or compensate (or both) cooperating brokers who may be subagents, buyer agents, or acting in some other capacity.

Second, there is the contract between the listing broker and cooperating brokers. While this may be created through an offer published through a multiple listing service or through some other method of formalized cooperative effort, it need not be. Unlike the bilateral listing contract (where generally the seller agrees to pay a commission in return for the listing broker's production of a ready, willing, and able purchaser), the contract between the listing broker and the cooperating broker is unilateral in nature. This simply means that the listing broker determines the terms and conditions of the offer to potential cooperating brokers (and this offer may vary as to different potential cooperating brokers or as to cooperating brokers in different categories). This type of contract differs from a bilateral contract also in that there is no contract formed between the listing broker and the potential cooperating brokers upon receipt of the listing broker's offer. The contract is formed only when accepted by the cooperating broker, and acceptance occurs only through performance as the procuring cause of the successful transaction.

Third, there is the purchase contract - sometimes referred to as the purchase and sale agreement. This bilateral contract between the seller and the buyer establishes their respective promises and obligations to each other, which may also impact on third parties. The fact that someone other

than the seller or buyer is referenced in the purchase contract does not make him/her a party to that contract, though it may create rights or entitlements which may be enforceable against a party (the buyer or seller).

Fourth, there may be a buyer-broker agreement in effect between the purchaser and a broker. Similar in many ways to the listing contract, this bilateral contract establishes the duties of the purchaser and the broker as well as the terms and conditions of the broker's compensation.

These contracts are similar in that they are created through offer and acceptance. They vary in that acceptance of a bilateral contract is through a reciprocal promise (e.g., the purchaser's promise to pay the agreed price in return for the seller's promise to convey good title), while acceptance of a unilateral contract is through performance (e.g., in producing or procuring a ready, willing, and able purchaser).

Each of these contracts is subject to similar hazards in formation and afterward. The maker's (offeror's) offer in any of these scenarios may be accepted or rejected. The intended recipient of the offer (or offeree) may counteroffer. There may be questions as to whether a contract was formed - e.g., was there an offer, was it accepted, was the acceptance on the terms and conditions specified by the maker of the offer - or was the "acceptance" actually a counteroffer (which, by definition, rejects the first offer). A contract, once formed, may be breached. These and other questions of contract formation arise on a daily basis. There are several methods by which contractual questions (or "issues" or "disputes") are resolved. These include civil lawsuits, arbitration, and mediation.

Another key contract is the one entered into when a real estate professional joins a local board of REALTORS[®] and becomes a REALTOR[®]. In return for the many benefits of membership, a REALTOR[®] promises to abide by the duties of membership including strict adherence to the Code of Ethics. Among the Code's duties is the obligation to arbitrate, established in Article 17. Article 17 is interpreted through four Standards of Practice among which is Standard of Practice 17-4 which enumerates four situations under which REALTORS[®] agree to arbitrate specified non-contractual disputes.

Boards and Associations of REALTORS[®] provide arbitration to resolve contractual issues and questions and specific non-contractual issues and questions that arise between members, between members and their clients, and, in some cases, between parties to a transaction brought about through the efforts of REALTORS[®]. Disputes arising out of any of the four above-referenced contractual relationships may be arbitrated, and the rules and procedures of boards and associations of REALTORS[®] require that certain types of disputes must be arbitrated if either party so requests. (Information on "mandatory" and "voluntary" arbitration is found elsewhere in the *Code of Ethics and Arbitration Manual*.)

While issues between REALTORS[®] and their clients - e.g., listing broker/seller (or landlord) or buyer broker/buyer (or tenant) - are subject to mandatory arbitration (subject to the client's agreement), and issues between sellers and buyers may be arbitrated at their mutual agreement, in many cases such issues are resolved in the courts or in other alternative dispute resolution forums (which may also be administered by boards or associations of REALTORS[®]). The majority of arbitration hearings conducted by boards and associations involve questions of contracts between REALTORS[®], most frequently between listing and cooperating brokers, or

between two or more cooperating brokers. These generally involve questions of procuring cause, where the panel is called on to determine which of the contesting parties is entitled to the funds in dispute. While awards are generally for the full amount in question (which may be required by state law), in exceptional cases, awards may be split between the parties (again, except where prohibited by state law). Split awards are the exception rather than the rule and should be utilized only when hearing panels determine that the transaction would have resulted only through the combined efforts of both parties. It should also be considered that questions of representation and entitlement to compensation are separate issues.

In the mid-1970s, the NATIONAL ASSOCIATION OF REALTORS® established the Arbitration Guidelines to assist boards and associations in reaching fair and equitable decisions in arbitration; to prevent the establishment of any one, single rule or standard by which arbitrable issues would be decided; and to ensure that arbitrable questions would be decided by knowledgeable panels taking into careful consideration all relevant facts and circumstances.

The Arbitration Guidelines have served the industry well for nearly two decades. But, as broker-to-broker cooperation has increasingly involved contracts between listing brokers and buyer brokers and between listing brokers and brokers acting in nonagency capacities, the time came to update the Guidelines so they remained relevant and useful. It is to this end that the following is intended.

Procuring Cause

As discussed earlier, one type of contract frequently entered into by REALTORS® is the listing contract between sellers and listing brokers. Procuring cause disputes between sellers and listing brokers are often decided in court. The reasoning relied on by the courts in resolving such claims is articulated in *Black's Law Dictionary*, Fifth Edition, definition of procuring cause:

The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with "efficient cause."

A broker will be regarded as the "procuring cause" of a sale, so as to be entitled to commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which, without break in their continuity, result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing, and able to buy real estate on the owner's terms.

Mohamed v. Robbins, 23 Ariz. App. 195, 531 p.2d 928, 930.

Also see Producing cause; Proximate cause.

Disputes concerning the contracts between listing brokers and cooperating brokers, however, are addressed by the National Association's Arbitration Guidelines promulgated pursuant to Article 17 of the Code of Ethics. While guidance can be taken from judicial determination of disputes between sellers and listing brokers, procuring cause disputes between listing and cooperating brokers, or between two cooperating brokers, can be resolved based on similar though not identical principles. While a number of definitions of procuring cause exist, and a myriad of factors may ultimately enter into any determination of procuring cause, for purposes of arbitration conducted by boards and associations of REALTORS®, procuring cause in broker to

broker disputes can be readily understood as the uninterrupted series of causal events which results in the successful transaction. Or, in other words, what "caused" the successful transaction to come about. "Successful transactions," as used in these Arbitration Guidelines, is defined as "a sale that closes or a lease that is executed." Many REALTORS[®], executive officers, lawyers and others have tried, albeit unsuccessfully, to develop a single, comprehensive template that could be used in all procuring cause disputes to determine entitlement to the sought-after award without the need for a comprehensive analysis of all relevant details of the underlying transaction. Such efforts, while well-intentioned, were doomed to failure in view of the fact that there is no "typical" real estate transaction any more than there is "typical" real estate or a "typical" REALTOR[®]. In light of the unique nature of real property and real estate transactions, and acknowledging that fair and equitable decisions could be reached only with a comprehensive understanding of the events that led to the transaction, the National Association's Board of Directors, in 1973, adopted Official Interpretation 31 of Article I, Section 2 of the Bylaws. Subsequently amended in 1977, Interpretation 31 establishes that:

A Board rule or a rule of a Multiple Listing Service owned by, operated by, or affiliated with a Board, which establishes, limits or restricts the REALTOR[®] in his relations with a potential purchaser, affecting recognition periods or purporting to predetermine entitlement to any award in arbitration, is an inequitable limitation on its membership.

The explanation of Interpretation 31 goes on to provide, in part:

[T]he Board or its MLS may not establish a rule or regulation which purports to predetermine entitlement to any awards in a real estate transaction. If controversy arises as to entitlement to any awards, it shall be determined by a hearing in arbitration on the merits of all ascertainable facts in the context of the specific case of controversy.

It is not uncommon for procuring cause disputes to arise out of offers by listing brokers to compensate cooperating brokers made through a multiple listing service. A multiple listing service is defined as a facility for the orderly correlation and dissemination of listing information among participants so that they may better serve their clients and customers and the public; is a means by which authorized participants make blanket unilateral offers of compensation to other participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law); is a means by which information is accumulated and disseminated to enable authorized participants to prepare appraisals and other valuations of real property; and is a means by which participants engaging in real estate appraisal contribute to common databases. Entitlement to compensation is determined by the cooperating broker's performance as procuring cause of the sale (or lease). While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional*, the definition of MLS and the offers of compensation made through the MLS provide that a listing broker's obligation to compensate a cooperating broker who was the procuring cause of sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration hearing panel based on all relevant facts and circumstances including, but not limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing

broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in the listing agreement might not be paid.

* Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to Multiple Listing Policy Statement 7.23, "Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of a Board of REALTORS®," *Handbook on Multiple Listing Policy*.

Factors for Consideration by Arbitration Hearing Panels

The following factors are recommended for consideration by hearing panels convened to arbitrate disputes between brokers, or between brokers and their clients or their customers. This list is not all-inclusive nor can it be. Not every factor will be applicable in every instance. The purpose is to guide panels as to facts, issues, and relevant questions that may aid them in reaching fair, equitable, and reasoned decisions.

Factor #1. No predetermined rule of entitlement

Every arbitration hearing is considered in light of all of the relevant facts and circumstances as presented by the parties and their witnesses. "Rules of thumb," prior decisions by other panels in other matters, and other predeterminants are to be disregarded.

Procuring cause shall be the primary determining factor in entitlement to compensation. Agency relationships, in and of themselves, do not determine entitlement to compensation. The agency relationship with the client and entitlement to compensation are separate issues. A relationship with the client, or lack of one, should only be considered in accordance with the guidelines established to assist panel members in determining procuring cause. (Adopted 4/95)

Factor #2. Arbitrability and appropriate parties

While primarily the responsibility of the grievance committee, arbitration hearing panels may consider questions of whether an arbitrable issue actually exists and whether the parties named are appropriate to arbitration. A detailed discussion of these questions can be found in Appendix I to Part Ten, Arbitrable Issues.

Factor #3. Relevance and admissibility

Frequently, hearing panels are asked to rule on questions of admissibility and relevancy. While state law, if applicable, controls, the general rule is that anything the hearing panel believes may assist it in reaching a fair, equitable, and knowledgeable decision is admissible.

Arbitration hearing panels are called on to resolve contractual questions, not to determine whether the law or the Code of Ethics has been violated. An otherwise substantiated award cannot be withheld solely on the basis that the hearing panel looks with disfavor on the potential recipient's manner of doing business or even that the panel believes that unethical conduct may have occurred. To prevent any appearance of bias, arbitration hearing panels and procedural review panels shall make no referrals of ethical concerns to the grievance committee. This is based on the premise that the fundamental right and primary responsibility to bring potentially unethical conduct to the attention of the grievance committee rests with the parties and others with firsthand knowledge. At the same time, evidence or testimony is not inadmissible simply

because it relates to potentially unethical conduct. While an award (or failure to make a deserved award) cannot be used to "punish" a perceived "wrongdoer", it is equally true that hearing panels are entitled to (and fairness requires that they) consider all relevant evidence and testimony so that they will have a clear understanding of what transpired before determining entitlement to any award.

Factor #4. Communication and contact - abandonment and estrangement

Many arbitrable disputes will turn on the relationship (or lack thereof) between a broker (often a cooperating broker) and a prospective purchaser. Panels will consider whether, under the circumstances and in accord with local custom and practice, the broker made reasonable efforts to develop and maintain an ongoing relationship with the purchaser. Panels will want to determine, in cases where two cooperating brokers have competing claims against a listing broker, whether the first cooperating broker actively maintained ongoing contact with the purchaser or, alternatively, whether the broker's inactivity, or perceived inactivity, may have caused the purchaser to reasonably conclude that the broker had lost interest or disengaged from the transaction (abandonment). In other instances, a purchaser, despite reasonable efforts by the broker to maintain ongoing contact, may seek assistance from another broker. The panel will want to consider why the purchaser was estranged from the first broker. In still other instances, there may be no question that there was an ongoing relationship between the broker and purchaser; the issue then becomes whether the broker engaged in conduct which caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions or lack of words or actions when called for. Panels will want to consider whether such conduct, or lack thereof, caused a break in the series of events leading to the transaction and whether the successful transaction was actually brought about through the initiation of a separate, subsequent series of events by the second cooperating broker.

Factor #5. Conformity with state law

The procedures by which arbitration requests are received, hearings are conducted, and awards are made must be in strict conformity with the law. In such matters, the advice of board legal counsel should be followed.

Factor #6. Consideration of the entire course of events

The standard of proof in board-conducted arbitration is a preponderance of the evidence, and the initial burden of proof rests with the party requesting arbitration (see Professional Standards Policy Statement 26). This does not, however, preclude panel members from asking questions of the parties or witnesses to confirm their understanding of testimony presented or to ensure that panel members have a clear understanding of the events that led to the transaction and to the request for arbitration. Since each transaction is unique, it is impossible to develop a comprehensive list of all issues or questions that panel members may want to consider in a particular hearing. Panel members are advised to consider the following, which are representative of the issues and questions frequently involved in arbitration hearings.

The nature and status of the transaction

1. What was the nature of the transaction? Was there a residential or commercial sale/lease?
2. Is or was the matter the subject of litigation involving the same parties and issues as the arbitration?

The nature, status, and terms of the listing agreement

1. What was the nature of the listing or other agreement: exclusive right to sell, exclusive agency, open or some other form of agreement?
2. Was the listing agreement in writing? If not, is the listing agreement enforceable?
3. Was the listing agreement in effect at the time the sales contract was executed?
4. Was the property listed subject to a management agreement?
5. Were the broker's actions in accordance with the terms and conditions of the listing agreement?
 - a. Were all conditions of the listing agreement met?
 - b. Did the final terms of the sale meet those specified in the listing agreement?
 - c. Did the transaction close? (Refer to Appendix I to Part Ten, Arbitrable Issues)
 - d. Did the listing broker receive a commission? If not, why not? (Refer to Appendix I to Part Ten, Arbitrable Issues)

The nature, status and terms of the offer to compensate

1. Was an offer of cooperation and compensation made in writing? If not, how was it communicated?
2. Is the claimant a party to whom the listing broker's offer of compensation was extended?
3. Were the broker's actions in accordance with the terms and conditions of the offer of cooperation and compensation (if any)? Were all conditions of the agreement met?

Roles and relationships of the parties

1. Who was the listing broker?
2. Who was the cooperating broker or brokers?
3. Were any of the parties acting as subagents? As buyer brokers? In some other capacity?
4. Did any of the cooperating brokers have an agreement, written or otherwise, to act as agent or in some other capacity on behalf of any of the parties?
5. Were any of the brokers (including the listing broker) acting as a principal in the transaction?
6. What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?

- a. Was the party to whom the property was sold represented by a party with whom the broker had previously dealt?
 - b. Is the primary shareholder of the buyer-corporation a party with whom the broker had previously dealt?
 - c. Was a prior prospect a vital link to the buyer?
7. Are all appropriate parties to the matter joined?

Initial contact with the purchaser

- 1. Who first introduced the purchaser or tenant to the property?
- 2. When was the first introduction made?
 - a. Was the introduction made when the buyer had a specific need for that type of property?
 - b. Was the introduction instrumental in creating the desire to purchase?
 - c. Did the buyer know about the property before the broker contacted him? Did he know it was for sale?
 - d. Were there previous dealings between the buyer and the seller?
 - e. Did the buyer find the property on his own?
- 3. How was the first introduction made?
 - a. Was the property introduced as an open house?
 - b. What subsequent efforts were made by the broker after the open house? (Refer to Factor #1)
 - c. Was the introduction made to a different representative of the buyer?
 - d. Was the "introduction" merely a mention that the property was listed?
 - e. What property was first introduced?

Conduct of the brokers

- 1. Were all required disclosures complied with?
- 2. Was there a faithful exercise of the duties a broker owes to his client/principal?
- 3. If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?
- 4. Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker? (Refer to Factor #4)
- 5. Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the

successful transaction - that is, did the broker perform services which assisted the buyer in making his decision to purchase? (Refer to Factor #4)

- a. Did the broker make preparations to show the property to the buyer?
 - b. Did the broker make continued efforts after showing the property?
 - c. Did the broker remove an impediment to the sale?
 - d. Did the broker make a proposal upon which the final transaction was based?
 - e. Did the broker motivate the buyer to purchase?
6. How do the efforts of one broker compare to the efforts of another?
- a. What was the relative amount of effort by one broker compared to another?
 - b. What was the relative success or failure of negotiations conducted by one broker compared to the other?
7. If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

Continuity and breaks in continuity (abandonment & estrangement)

1. What was the length of time between the broker's efforts and the final sales agreement?
2. Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale or lease, or was the series of events hindered or interrupted in any way?
 - a. Did the buyer terminate the relationship with the broker? Why? (Refer to Factor #4)
 - b. Did negotiations break down?
3. If there was an interruption or break in the original series of events, how was it caused, and by whom?
 - a. Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?
 - b. Did the purchaser's motive for purchasing change?
 - c. Was there interference in the series of events from any outside or intervening cause or party?
4. Did the broker who made the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker's inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction?
5. Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser, or at the request of the purchaser?

Conduct of the buyer

1. Did the buyer make the decision to buy independent of the broker's efforts/information?
2. Did the buyer negotiate without any aid from the broker?
3. Did the buyer seek to freeze out the broker?
 - a. Did the buyer seek another broker in order to get a lower price?
 - b. Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?
 - c. Did the contract provide that no brokers or certain brokers had been involved?

Conduct of the seller

1. Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equaled the broker's commission?
 - a. Was there bad faith evident from the fact that a sale to a third party was a straw transaction (one in which a non-involved party posed as the buyer) which was designed to avoid paying commission?
 - b. Did the seller freeze out the broker to avoid a commission dispute or to avoid paying a commission at all?
2. Was there bad faith evident from the fact that the seller told the broker he wouldn't sell on certain terms, but did so via another broker or via the buyer directly?

Leasing transactions

1. Did the cooperating broker have a tenant representation agreement?
2. Was the cooperating broker working with the "authorized" staff member of the tenant company?
3. Did the cooperating broker prepare a tenant needs analysis?
4. Did the cooperating broker prepare a market analysis of available properties?
5. Did the cooperating broker prepare a tour book showing alternative properties and conduct a tour?
6. Did the cooperating broker show the tenant the property leased?
7. Did the cooperating broker issue a request for proposal on behalf of the tenant for the property leased?
8. Did the cooperating broker take an active part in the lease negotiations?
9. Did the cooperating broker obtain the tenant's signature on the lease document?
10. Did the tenant work with more than one broker; and if so, why?

Other information

Is there any other information that would assist the hearing panel in having a full, clear understanding of the transaction giving rise to the arbitration request or in reaching a fair and equitable resolution of the matter?

These questions are typical, but not all-inclusive, of the questions that may assist hearing panels in understanding the issues before them. The objective of a panel is to carefully and impartially weigh and analyze the whole course of conduct of the parties and render a reasoned peer judgment with respect to the issues and questions presented and to the request for award.

Sample Fact Situation Analysis

The National Association's Professional Standards Committee has consistently taken the position that arbitration awards should not include findings of fact or rationale for the arbitrators' award. Among the reasons for this are the fact that arbitration awards are not appealable on the merits but generally only on the limited procedural bases established in the governing state arbitration statute; that the issues considered by hearing panels are often myriad and complex, and the reasoning for an award may be equally complex and difficult to reduce to writing; and that the inclusion of written findings of fact or rationale (or both) would conceivably result in attempts to use such detail as "precedent" in subsequent hearings which might or might not involve similar facts. The end result might be elimination of the careful consideration of the entire course of events and conduct contemplated by these procedures and establishment of local, differing arbitration "templates" or predeterminants of entitlement inconsistent with these procedures and Interpretation 31.

Weighed against these concerns, however, was the desire to provide some model or sample applications of the factors, questions, and issues set forth in these Arbitration Guidelines. The following "fact situations" and analyses are provided for informational purposes and are not intended to carry precedential weight in any hearing.

Fact Situation #1

Listing Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker Z, not a participant in the MLS, called to arrange an appointment to show the property to a prospective purchaser. There was no discussion of compensation. Broker Z presented Broker L with a signed purchase agreement, which was accepted by the seller. Subsequently, Broker Z requested arbitration with Broker L, claiming to be the procuring cause of sale.

Analysis:

While Broker Z may have been the procuring cause of sale, Broker L's offer of compensation was made only to members of the MLS. Broker L never offered cooperation and compensation to Broker Z, nor did Broker Z request compensation at any time prior to instituting the arbitration request. There was no contractual relationship between them, and therefore no issue to arbitrate.

Fact Situation #2

Same as #1, except Broker Z is the buyer's agent.

Analysis:

Same result, since there was no contractual relationship between Broker L and Broker Z and no issue to arbitrate.

Fact Situation #3

Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents.

Broker S (a subagent) showed the property to Buyer #1 on Sunday and again on Tuesday. On Wednesday, Broker A (a subagent) wrote an offer to purchase on behalf of Buyer #1 which was presented to the seller by Broker L and which was accepted. At closing, subagency compensation is paid to Broker A. Broker S subsequently filed an arbitration request against Broker A, claiming to be the procuring cause of sale.

Analysis:

Broker S's claim could have been brought against Broker A (pursuant to Standard of Practice 17-4) or against Broker L (the listing broker), who had promised to compensate the procuring cause of sale, thus arguably creating a contractual relationship between Broker L and Broker S.

(Amended 11/96)

Fact Situation #4

Same as #3, except Broker S filed the arbitration request against Broker L (the listing broker).

Analysis:

This is an arbitrable matter, since Broker L promised to compensate the procuring cause of sale. Broker L, to avoid the possibility of having to pay two cooperating brokers in the same transaction, should join Broker A in arbitration so that all competing claims can be resolved in a single hearing. The hearing panel will consider, among other things, why Buyer #1 made the offer to purchase through Broker A instead of Broker S. If it is determined that Broker S initiated a series of events which were unbroken in their continuity and which resulted in the sale, Broker S will likely prevail.

Fact Situation #5

Same as #3, except Broker L offered compensation only to subagents. Broker B (a buyer agent) requested permission to show the property to Buyer #1, wrote an offer which was accepted, and subsequently claimed to be the procuring cause of sale.

Analysis:

Since Broker L did not make an offer of compensation to buyer brokers, there was no contractual relationship between Broker L and Broker B and no arbitrable issue to resolve.

If, on the other hand, Broker L had offered compensation to buyer brokers either through MLS or otherwise and had paid Broker A, then arbitration could have been conducted between Broker

B and Broker A pursuant to Standard of Practice 17-4. Alternatively, arbitration could occur between Broker B and Broker L.

Fact Situation #6

Listing Broker L placed a listing in the MLS and made an offer of compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1, who appeared uninterested. Broker S made no effort to further contact Buyer #1. Six weeks later, Broker B (a buyer broker) wrote an offer on the property on behalf of Buyer #1, presented it to Broker L, and it was accepted. Broker S subsequently filed for arbitration against Broker L, claiming to be the procuring cause. Broker L joined Broker B in the request so that all competing claims could be resolved in one hearing.

Analysis:

The hearing panel will consider Broker S's initial introduction of the buyer to the property, the period of time between Broker S's last contact with the buyer and the time that Broker B wrote the offer, and the reason Buyer #1 did not ask Broker S to write the offer. Given the length of time between Broker S's last contact with the buyer, the fact that Broker S had made no subsequent effort to contact the buyer, and the length of time that transpired before the offer was written, abandonment of the buyer may have occurred. If this is the case, the hearing panel may conclude that Broker B instituted a second, separate series of events that was directly responsible for the successful transaction.

Fact Situation #7

Same as #6, except that Broker S (a subagent) showed Buyer #1 the property several times, most recently two days before the successful offer to purchase was written by Broker B (a buyer broker). At the arbitration hearing, Buyer #1 testified she was not dissatisfied in any way with Broker S but simply decided that "I needed a buyer agent to be sure that I got the best deal."

Analysis:

The hearing panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had remained in contact with the buyer on an ongoing basis; and whether Broker S's efforts were primarily responsible for bringing about the successful transaction. Unless abandonment or estrangement can be demonstrated, resulting, for example, because of something Broker S said or did (or neglected to say or do but reasonably should have), Broker S will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues.

Fact Situation #8

Similar to #6, except Buyer #1 asked Broker S for a comparative market analysis as the basis for making a purchase offer. Broker S reminded Buyer #1 that he (Broker S) had clearly disclosed his status as subagent, and that he could not counsel Buyer #1 as to the property's market value. Broker B based his claim to entitlement on the grounds that he had provided Buyer #1 with information that Broker S could not or would not provide.

Analysis:

The hearing panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had made early and timely disclosure of his status as a subagent; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's inability to provide a comparative market analysis of the property had clearly broken the chain of events leading to the sale. If the panel determines that the buyer did not have cause to leave Broker S for Broker B, they may conclude that the series of events initiated by Broker S remained unbroken, and Broker S will likely prevail.

Fact Situation #9

Similar to #6, except Broker S made no disclosure of his status as subagent (or its implications) until faced with Buyer #1's request for a comparative market analysis.

Analysis:

The hearing panel should consider Broker S's initial introduction of the buyer to the property; Broker S's failure to clearly disclose his agency status on a timely basis; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's belated disclosure of his agency status (and its implications) clearly broke the chain of events leading to the sale. If the panel determines that Broker S's failure to disclose his agency status was a reasonable basis for Buyer #1's decision to engage the services of Broker B, they may conclude that the series of events initiated by Broker S had been broken, and Broker B will likely prevail.

Fact Situation #10

Listing Broker L placed a property on the market for sale or lease and offered compensation to brokers inquiring about the property. Broker A, acting as a subagent, showed the property on two separate occasions to the vice president of manufacturing for ABC Corporation. Broker B, also acting as a subagent but independent of Broker A, showed the same property to the chairman of ABC Corporation, whom he had known for more than fifteen (15) years. The chairman liked the property and instructed Broker B to draft and present a lease on behalf of ABC Corporation to Broker L, which was accepted by the owner/ landlord. Subsequent to the commencement of the lease, Broker A requested arbitration with Broker L, claiming to be the procuring cause.

Analysis:

This is an arbitrable matter as Broker L offered compensation to the procuring cause of the sale or lease. To avoid the possibility of having to pay two commissions, Broker L joined Broker B in arbitration so that all competing claims could be resolved in a single hearing. The hearing panel considered both brokers' introductions of the property to ABC Corporation. Should the hearing panel conclude that both brokers were acting independently and through separate series of events, the hearing panel may conclude that Broker B was directly responsible for the lease and should be entitled to the cooperating broker's portion of the commission.

Fact Situation #11

Broker A, acting as the agent for an out-of-state corporation, listed for sale or lease a 100,000 square foot industrial facility. The property was marketed offering cooperation and compensation to both subagents and buyer/tenant agents. Over a period of several months, Broker A made the availability of the property known to XYZ Company and, on three (3) separate occasions, showed the property to various operational staff of XYZ Company. After the third showing, the vice president of finance asked Broker A to draft a lease for his review with the president of XYZ Company and its in-house counsel. The president, upon learning that Broker A was the listing agent for the property, instructed the vice president of finance to secure a tenant representative to ensure that XYZ Company was getting "the best deal." One week later, tenant representative Broker T presented Broker A with the same lease that Broker A had previously drafted and the president of XYZ Company had signed. The lease was accepted by the out-of-state corporation. Upon payment of the lease commission to Broker A, Broker A denied compensation to Broker T and Broker T immediately requested arbitration claiming to be the procuring cause.

Analysis:

The hearing panel should consider Broker A's initial introduction of XYZ Company to the property, Broker A's contact with XYZ on an on-going basis, and whether Broker A initiated the series of events which led to the successful lease. Given the above facts, Broker A will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues.

Fact Situation #12

Broker A has had a long standing relationship with Client B, the real estate manager of a large, diversified company. Broker A has acquired or disposed of twelve (12) properties for Client B over a five (5) year period. Client B asks Broker A to locate a large warehouse property to consolidate inventories from three local plants. Broker A conducts a careful evaluation of the operational and logistical needs of the plants, prepares a report of his findings for Client B, and identifies four (4) possible properties that seem to meet most of Client B's needs. At Client B's request, he arranges and conducts inspections of each of these properties with several operations level individuals. Two (2) of the properties were listed for sale exclusively by Broker C. After the inspections, Broker A sends Broker C a written registration letter in which he identifies Client B's company and outlines his expectation to be paid half of any commission that might arise from a transaction on either of the properties. Broker C responds with a written denial of registration, but agrees to share any commission that results from a transaction procured by Broker A on either of the properties. Six (6) weeks after the inspections, Client B selects one of the properties and instructs Broker A to initiate negotiations with Broker C. After several weeks the negotiations reach an impasse. Two (2) weeks later, Broker A learns that Broker C has presented a proposal directly to Client B for the other property that was previously inspected. Broker A then contacts Broker C, and demands to be included in the negotiations, Broker C refuses, telling Broker A that he has "lost control of his prospect," and will not be recognized if a transaction takes place on the second property. The negotiations proceed, ultimately resulting in a sale of the second property. Broker A files a request for arbitration against Broker C.

Analysis:

This would be an arbitrable dispute as a compensation agreement existed between Broker A and Broker C. The hearing panel will consider Broker A's introduction of the property to B, the property reports prepared by Broker A, and the time between the impasse in negotiations on the first property and the sale of the second property. If the hearing panel determines that Broker A initiated the series of events that led to the successful sale, Broker A will likely prevail.

Mediation – A “Winning” Alternative

Despite the best efforts of well-intentioned REALTORS[®], disagreements still occur. While less formal, faster, and less expensive than litigation, arbitration is not without cost in both time and money on the part of the parties. Substantial board/association human and financial resources are also consumed in providing this service to members. There is an alternative to arbitration, albeit one that is available only where all parties to a dispute voluntarily agree to use it - mediation.

Mediation is a service provided by every board/association of REALTORS[®]. Unlike arbitration, in which the parties present their cases to a panel of arbitrators whose decision is final and binding, mediation brings the disputing parties together in an atmosphere conducive to dialogue and conciliation, encouraging them to work together to reach a mutually acceptable resolution. Experience has shown that 80% or more of the disputes that otherwise would be arbitrated can be resolved faster and more efficiently through mediation. This is a significant savings in time and expense for both the parties and for boards and associations. Mediation can also be a positive experience for those who participate because, rather than a "winner" and a "loser" being determined by a panel of arbitrators, in mediation the parties work together, guided by a mediator, to fashion their own solution. Mediation is frequently a "win-win" situation for everyone.

Boards/associations generally have one or more mediation officers who act as facilitators/intermediaries. These are typically REALTORS[®] who are experienced and adept in dispute resolution techniques. While mediators often have personal "styles", their primary objective is to help each party appreciate the position of the other party, then to move them forward toward an amicable resolution.

Detailed information about mediation is in the National Association's *Code of Ethics and Arbitration Manual*. Specific information about the procedures for initiating mediation can be obtained from local boards/associations of REALTORS[®].

Mediation can be initiated in a number of ways. While there is no reason why two REALTORS[®] with a disagreement cannot simply ask the local board/association to provide a mediator, in many instances mediation begins with the filing of a formal arbitration request. In some areas, requests for arbitration are automatically reviewed by the grievance committee and, after a determination is made that an arbitrable dispute exists, the disputing parties are invited to participate in mediation.

In other areas, filing a formal arbitration request automatically triggers a request to the parties asking whether they would like to attempt mediation. If the parties agree to mediate their dispute, the grievance committee is not called on to consider whether an arbitrable dispute exists unless a party subsequently withdraws from the mediation process, or mediation proves unsuccessful. And, where mediation is offered prior to initial review of an arbitration request by the grievance committee (to determine whether an arbitrable dispute actually exists), if any of the parties initially refused to participate in mediation, mediation will be offered to the parties again following the grievance committee's review if an arbitrable dispute actually exists. This "second chance" approach is based on the premise that mediation is preferable to arbitration, not only from the parties' standpoint but from that of the board/association, and acknowledges that some parties may not choose to mediate unless it is clear that an arbitration hearing is the

undeniable alternative. Offering a second chance to participate in mediation ultimately benefits the parties and the board/association.

A mediation session is fundamentally simple. The mediation officer uses various techniques to encourage the parties to explore, understand, and appreciate each other's position. The most desirable solution is one crafted by the parties themselves through cooperative effort. When the parties reach agreement, they are encouraged to put it in writing and sign it. If the parties are unable to reach a mutually acceptable solution, the mediator can recommend a solution. The mediator's recommendation can be made orally or in writing, though a written proposal that the parties can subsequently consider is preferred. The parties then have up to forty-eight hours to consider the mediator's recommendation and decide whether they will agree to it. If either party does not agree with the mediator's recommendation, the mediation process is over and the arbitration process proceeds (assuming arbitration has been requested).

The fact that at times mediation does not produce the desired result does not diminish its value to REALTORS[®] and to boards/associations. There will be instances when REALTORS[®] mediate in good faith but, for one reason or another, are simply unable to reach a joint agreement or accept the solution proposed by the mediator. In such cases, the alternative is a decision imposed on the parties by a panel of arbitrators after an arbitration hearing. While this may be the only answer, a mutually-fashioned, mutually agreed upon solution to disagreements between REALTORS[®] is the preferred outcome.

(revised July, 2002)

Avoiding Disputes -- Some Suggestions

The best way to avoid arbitration is to minimize any possibility that disagreements or disputes will arise. While it is impossible to avoid disagreements under all circumstances, certain "common sense" steps can be taken by listing and cooperating brokers to ensure that cooperative transactions proceed smoothly.

Listing Brokers

- When taking a listing, ask whether the property was previously listed. Is it currently listed?
- If the property was previously listed, is there a "broker protection clause" in effect? Are there certain named prospects reserved? Does the "broker protection" terminate if the property is relisted?
- Ensure that cooperative compensation for your listings is accurately published in MLS.
- If your listing is not in MLS, be sure that potential cooperating brokers understand your compensation offer prior to commencing their cooperative efforts.
- Communicate changes in compensation offers promptly.
- Be sure that the disposition of forfeited earnest money is clearly addressed in listing contracts.
- Remember that MLS rules may provide that cooperating brokers, after making reasonable efforts to contact listing brokers, can deal directly with sellers unless direct contact has been expressly prohibited by the listing broker.
- Be sure that associates who provide information about your listings are properly prepared/informed.
- Present offers promptly.
- Communicate counteroffers promptly.
- Allow cooperating brokers to be present when offer is presented.
- Be sure that cooperating brokers are informed if the seller refuses to permit them to be present at the presentation of an offer.
- During open houses, have a sign-in roster for buyers and cooperating brokers.
- During open houses, ask buyers "Are you represented?" "Are you working with another broker (firm)?"
- Consider mediation.
- Return telephone calls promptly.
- The fact that a purchaser may have seen a property at an open house does not, in and of itself, determine procuring cause.
- Keep accurate written, contemporaneous records, notes and documentation, including all appointments, showings, meetings, and conversations.

- After an offer is accepted, keep the parties informed as the transaction moves to closing.

Cooperating Brokers

- Before entering into a buyer representation agreement, determine whether the buyer was subject to a prior agreement. Is the buyer currently represented? Is there any residual obligation for the buyer to compensate another broker?
- Prequalify purchasers.
- Realize that "blanket consent" to show other brokers' listings does not exist unless expressly granted by the listing broker.
- When making arrangements to show property listed with other brokers, call the listing broker to make an appointment. If possible, accompany the buyer to the showing. If unable to accompany the buyer to the showing, be sure the listing broker realizes that the buyer is represented.
- If there is any question, use reasonable efforts to determine whether a property is or was listed.
- Ask whether the buyer has been previously introduced to a property. By whom? When?
- Be sure the listing broker is informed if the buyer refuses to permit the listing broker to be present at the presentation of a counteroffer.
- Allow listing brokers to be present when counter-offers are presented.
- Communicate offers promptly.
- Present counteroffers promptly.
- Consider mediation.
- Return telephone calls promptly.
- If a listing is not in MLS, verify the terms of compensation, if any, that are being offered by the listing broker prior to commencing your cooperative efforts.
- Keep accurate written, contemporaneous records, notes and documentation, including all appointments, showings, meetings and conversations.
- After an offer is accepted, keep the parties informed as the transaction moves to closing.
- Remember that the existence of an established agency relationship does not, by itself, determine procuring cause.

The REALTORS® Code of Ethics -- A Gift of Vision

At times the rationale and value of the ethical duties that REALTORS® voluntarily embrace - including the duty of arbitration -- are called in question. In 1978, William D. North, formerly the National Association's Executive Vice President and General Counsel, described the Code of Ethics as "a gift of vision." Mr. North's comments, which were originally published in the August, 1978 issue of *The Executive Officer* and which appear in the *Code of Ethics and Arbitration Manual*, remain relevant after two decades and are reproduced here, at the conclusion of the *Guide*, to underscore the significance of the Code in the professional lives of all REALTORS®.

The REALTORS® Code of Ethics -- A Gift of Vision

by William D. North

The Code of Ethics of the National Association of REALTORS® represents one of those rare creations of man -- a living document; a document which somehow preserves its significance, relevance and usefulness despite the passing of years and the changing of the times.

The Code is an unusual Gift of Vision: the vision of those who dreamed that the business of real estate could become a profession, the vision of those who believed that the search for the highest and best use of the land required the highest and best measures of professional responsibility, and the vision of those who recognized private ownership of the land as indispensable to political democracy and a free and prosperous citizenry.

It is this Gift of Vision which has enabled the Code to survive half a century of unprecedented social, political, economic, and legal change substantially unchanged.

The creators and keepers of the Code have realized that to remain relevant and useful, the Code must be a great deal more than simply a set of rules for the conduct of real estate transactions. To endure, the Code must be a criterion of excellence while at the same time constituting a realistic standard of performance. It must be a guide to measure professional conduct, while at the same time representing the furthest reach of professional aspiration. The Code must remain constant without becoming absolute, must be enforceable without being oppressive, and must be meaningful without being dogmatic.

The Code of Ethics has been able to meet all these needs and reconcile all these objectives for one reason only -- the vision of its creators in adopting as the unifying rationale of the Code the Concept of Service to the Public.

Every Article of the Code is premised on this single concept. This single concept provides the philosophical basis by which each Article must be interpreted and applied. This single concept, by which the various Articles of the Code are rationalized, is the reason the Code has been and is a living document. Service to the Public is the end and the Code is the means to that end.

Origins of the Code

In today's world, preoccupied as it is with social responsibility and oriented as it is to consumer concerns, it is hard to visualize how truly revolutionary the Code of Ethics was when it was adopted in 1913.

The history of the real estate business for the preceding 150 years was a history of rampant land speculation, exploitation, and disorder. It was an era before the adoption of state regulatory licensing systems. It was a time when real estate agents, if they were licensed at all, were licensed as peddlers.

It was the era of the fraudulent subdivision, the fake city addition, the multiple first mortgage, the net listing, and a myriad of other get rich quick schemes involving the sale of land. It was the era of caveat emptor and the Robber Barons whose motto was not Let the Public Be Served but rather Let the Public Be Damned.

This was the era which produced the Code of Ethics of the National Association. With the exception of a now defunct association of printers, the REALTORS[®] were the first business group outside the learned professions of medicine, engineering, and law to adopt a Code of Ethics. It was an uncommon event with uncommon men and women making an uncommon commitment to business integrity and fair dealing.

It was not a commitment coerced by threat of government sanction but a commitment predicated on a need perceived by REALTORS[®] themselves. It was not a commitment mandated by the marketplace because it involved the voluntary acceptance of liabilities and responsibilities, duties and costs, limitations and obligations, which the public did not even perceive as their due. It was, in sum, a commitment to the concept of service to the public as an article of faith in professionalism.

Significance of the Code

The significance of the Code rests not merely in the guidance it provides those who subscribe to it, but also in the guidance it has provided the National Association in its growth and development. From the very beginning, the Code has provided the impetus for Association involvement in education of REALTORS[®] to support [the Preamble] and [Article] 11; in the protection of private property ownership to support [the Preamble]; in the creation and administration of multiple listing and other cooperative arrangements to support Articles [5] and [3]; in the arbitration of disputes to support Article [17]; in the protection of the consumer to support Articles [1] and [2].

The Code has been significant not merely in its impact on the focus of Association programs and activities, but also in its impact on Association organization and structure. Thus, the local Board of REALTORS[®] is an indispensable constituent of the REALTOR[®] family in large measure because it represents an effective forum for the enforcement of the Code. From this function, too, proceeds the need for Board jurisdictions and the structure of the State Association. Perhaps, more than anything else, the Code has provided the interdependent relationship which binds the National Association, its Member Boards, State Associations, and Institutes, Societies, and Councils into a single working constituency.

The Code and the Law

The Code of Ethics is never opposed to the law. The Code, in its application or implementation, must always be construed harmoniously and consistently with the law.

But the Code is not the law. It is supported not by the coercive power of the state but rather by the principles of contract. Acceptance of REALTOR[®] membership creates a form of "professional compact," the terms of which the Code defines. No matter how similar the mandates of the Code may be to the dictates of the license laws and other legislation, the difference between them is fundamental and unavoidable.

The relation of the Code to the law is two-fold. First, the Code defines those duties and obligations required in the public interest which are beyond the capacity or power of the law to mandate, and second, the Code supports the law by requiring a higher sensitivity to the duties and obligations which it imposes.

In the performance of its first role, the Code is concerned with identifying the extensions of professionalism to serve the public's evolving needs. In the performance of its other role, the Code is concerned with the refinement and specific application of legal principles to real estate transactions.

When the Code was first adopted, there were no statutory definitions of the professional responsibilities necessary to protect and serve the public. That such definitions exist today in state license laws is in large measure the result of the Code. Thus, as government came to recognize that the professional duties and obligations assumed by REALTORS[®] voluntarily under the Code truly served the public interest, it then conditioned licensure on the licensee's acceptance to protect the whole public and not merely those served by REALTORS[®].

While the task of identifying the extensions of professionalism continues, certainly in recent years, with the general licensure of the profession, the role of the Code is sensitizing REALTORS[®] to the full implications and applications of their legal obligations has become increasingly important. It is this role which has involved the Code so intimately with such legal doctrines as implied warranty, agency and fiduciary duty and equal opportunity.

Because the Code is a living document and real estate is a dynamic business and profession, the law need never be its substitute. So long as the aspiration to better serve the public remains the underlying concept of the Code it must evolve and grow in significance and importance consonant with but independent of the law.

The Code and Its Use

There is no idea which cannot be misapplied; no faith which cannot be exploited; no concept which cannot be abused; and no principle which cannot be perverted. For this reason, the integrity of the Code and the value of its vision of the real estate industry depends ultimately upon its use.

If it is applied inconsistently, it becomes arbitrary and hence oppressive. If it is applied without understanding, it becomes unreasonable and hence dogmatic. If it is used in ignorance, it becomes meaningless; if it is used inappropriately, it becomes irrelevant; and if it is used without moderation, it becomes irrational.

No Code of Ethics can long survive its misuse or misapplication. This is why the REALTORS[®] Code of Ethics must be applied with continuing and conscientious concern for procedural due process. Procedural due process is both an explicit and implied requirement of the Code. It is required explicitly by Article [14], which requires a "proper tribunal" and implicitly by the Preamble's reliance on the Golden Rule. The due process requirement, after all, requires nothing more than a fair and diligent search for the truth-with an opportunity for all facts to be gathered; all views to be heard; all defenses to be raised and all prejudice or bias to be expunged. But while due process requires nothing more than a fair and diligent search for the truth, so the Code may be properly applied, due process permits "nothing less." There is no acceptable level of unfairness, no permissible slight of the search.

Conclusion

In its Code of Ethics the family of REALTORS[®] has been offered a farsighted vision of the profession as it could be and should be. This vision, however, must not be blurred by myopic applications of the Code for shortsighted gains at the expense of farsighted objectives. A REALTOR[®] who serves the public serves himself by guaranteeing his future.

But neither must this vision, however clear, obscure the fact that the goals of the Code must be reached step by step, following the path of due process rather than the line of least resistance.

To REALTORS[®], the Code of Ethics offers the lessons of hindsight, the guidance of foresight, and the understanding of insight-A Rare Gift of Vision.